

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

JACK'S TOURS, INC.,
a corporation,

Complainant,

v.

KILAUEA MILITARY CAMP

Respondent.

DOCKET NO. 04-0141

DECISION AND ORDER NO. 21876

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

Filed June 17, 2005
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

JACK'S TOURS, INC.,
a corporation,

V.

Respondent .

Decision and Order No. 21876

By this Order, the commission, *sua sponte*, dismisses the Formal Complaint ("Complaint")¹ of JACK'S TOURS, INC. ("Jack's" or "Complainant"), against KILAUEA MILITARY CAMP ("Respondent" or "KMC") (together with Complainant, the "Parties"), for lack of subject matter jurisdiction.

Background and Procedural History

On June 4, 2004, Jack's filed a Complaint with the commission, pursuant to Hawaii Administrative Rules ("HAR")

¹Jack's Complaint, Exhibits A-D, JT 0001 - JT 00027 and Verification, filed on June 4, 2004.

§§ 6-61-67 and 6-68-13, alleging violations of Hawaii Revised Statutes ("HRS") Chapter 271 by KMC².

By Order No. 21116, filed on July 12, 2004, Respondent was ordered to file an answer to the Complaint. On July 30, 2004, Respondent filed a timely Answer and Affirmative Defenses to Jack's Complaint ("Answer"), pursuant to HAR § 6-61-68.³

On September 10, 2004, by Order No. 21342, the commission ordered the Parties to file supplemental briefs on the issue of whether or not the commission has subject matter jurisdiction to hear the Complaint ("Supplemental Brief"). Respondent filed its Supplemental Brief on September 28, 2004. Complainant filed its Supplemental Brief on September 30, 2004.

II.

Summary of the Parties' Respective Arguments

A.

Complaint and Answer

Jack's alleges that Respondent is a "common carrier by motor vehicle",⁴ engaged in the unauthorized transportation of

²The DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") is an ex officio party in all commission proceedings, pursuant to HAR § 6-61-62. However, the Consumer Advocate, in its Statement of Position, filed June 8, 2004, indicated that it will not participate in the instant proceeding.

³KMC was ordered to file an answer within twenty (20) days of the filing of Order No. 21116.

⁴See HRS § 271-4(11).

persons and property by motor vehicle, over the highways of the State of Hawaii ("State"), without possessing a certificate of public convenience and necessity ("CPCN") from the commission, in violation of HRS § 271-8. In this regard, Jack's asserts that KMC is causing harm to commission-regulated motor carriers, such as itself, by promoting unfair or destructive competition, with KMC receiving an unfair advantage in competition with regulated motor carriers.⁵

Jack's asks the commission to (1) find KMC in violation of HRS § 271-8 and (2) issue an order to show cause as to why KMC should not immediately cease and desist from transporting members of the general public over public highways of the State until such time as KMC obtains a CPCN from the commission.

In its Answer, Respondent denies that it holds itself out to the general public as a common carrier, asserting that it provides transportation services to only those patrons authorized by its rules and regulations.⁶ Respondent further asserts that even if it serves customers beyond its authority in violation of any federal regulation, the appropriate forum for such a dispute is not the commission, but with federal authorities.⁷

⁵Complaint at 11.

⁶Jack's emphasizes that its Complaint pertains only to the alleged provision by KMC of motor carrier service to the general public, not to authorized military personnel and other authorized patrons. Jack's Supplemental Brief at 10.

⁷Answer at 14.

B.

Supplemental Briefs

As requested by the commission, the Parties submitted Supplemental Briefs on the issue of whether the commission has subject matter jurisdiction to hear the Complaint.

Jack's alleges that KMC's status as a non-appropriated fund instrumentality ("NAFI"),⁸ does not preclude it from commission jurisdiction. It claims that KMC is not entitled to federal immunity from state law because KMC's motor carrier services are made available to the general public, and KMC, thus, loses its federal immunity as a NAFI.⁹

Jack's contends that the commission is not preempted by the Supremacy Clause of the United States from exercising

⁸As a NAFI, KMC is under the control of the Secretary of the Army, subject to the authority, direction and control of the Secretary of Defense. 10 United States Code Service ("USCS") § 3013(b)(9). NAFI is defined, in Department Of Defense ("DoD") Directive No. 1015.1, Enclosure 2 as an:

"integral DoD organizational entity that performs an essential [g]overnment function. It acts in its own name to provide or to assist other DoD organizations in providing [morale, welfare and recreation] programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the [h]eads of DoD [c]omponents . . . It is not incorporated under the laws of any [s]tate . . . and it enjoys the legal status of an instrumentality of the United States." Appendix B to KMC's Supplemental Brief, Enclosure 2.

⁹Jack's Supplemental Brief at 6.

jurisdiction over KMC.¹⁰ KMC is not an agency of the federal government, thus commission regulation of KMC would not constitute impermissible direct regulation of an agency of the federal government. Moreover, Jack's adds that there is neither express congressional language prohibiting commission jurisdiction, nor is commission jurisdiction barred by implication.¹¹

Finally, Jack's asserts that KMC cannot avail itself of the federal enclave exception in avoiding commission jurisdiction. Jack's describes a federal enclave as "an area of land owned by the United States, ownership of which has been (1) consented to by the state in which the land is located . . . and (2) if after 1940, formally accepted by the United States."¹² In some instances, state regulation may apply (1) where there is a clear congressional directive, (2) where a specific reservation of state authority was made at the time the property in question became a federal enclave, or (3) where state regulation in existence at the time of creation of the enclave has not been

¹⁰Article VI, cl.2 of the Constitution of the United States reads in full, "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

¹¹Jack's Supplemental Brief at 13-21.

¹²Jack's Supplemental Brief at 23.

repealed by congressional action.¹³ Jack's argues that none of these circumstances are present in the instant situation.

KMC requests that the commission dismiss the Complaint for lack of subject matter jurisdiction.¹⁴ KMC maintains that Complainant fails to state a claim upon which relief may be granted because the commission lacks subject matter jurisdiction. In addition, in the instant case, there has been no congressional grant of jurisdiction over KMC to the State which KMC says is necessary for the commission to assume subject matter jurisdiction.¹⁵

KMC points out that the instant Complaint involves activities being performed by an instrumentality of the federal government, as distinguished from examples cited by Jack's involving activities performed by private parties for the federal government. Cf., In re Time Warner Communications of Hawaii, Docket No. 94-0264, Order No. 13738 (Haw. PUC January 20, 1995), (wherein the commission held that the Supremacy Clause of the constitution did not bar the regulation by the commission of the Hawaii Information Transfer System services to the federal government through a private company).

¹³Jack's Supplemental Brief at 24.

¹⁴The commission notes that while KMC requests in its Supplemental Brief that the commission dismiss the Complaint for lack of subject matter jurisdiction, no formal motion to this effect was made.

¹⁵KMC's Supplemental Brief at 4.

KMC argues that the referenced case is distinguishable from this matter because that case involved a private company providing service to the federal government.

KMC rejects Jack's federal enclave argument. It argues that the cases cited by Jack are distinguishable (See, Anderson v. Crown Cork & Seal, 93 F. Supp. 2d 697, 2000 US Dist. LEXIS 5210 (2000), and Miller v. Wackenhut Services, 808 F. Supp. 697, 1992 US Dist. LEXIS 18778 (1992)), because those cases involved claims or actions between private litigants in a federal enclave situation. KMC further argues that Jack's inference that federal supremacy rules apply only, literally, in a federal enclave is erroneous.¹⁶

Finally, KMC argues that as a federal instrumentality, any alleged violation of federal regulations would be more appropriately determined in a forum of federal jurisdiction, and not before the commission.

III.

Discussion

The basis of Jack's Complaint is the allegation that KMC is a common carrier by motor vehicle, as defined in HRS § 271-4(11), and as such should abide by the motor carrier laws, rules and regulations of the commission. To be a common carrier by motor vehicle, it must be shown that KMC holds itself out to the general public to engage in the transportation of passengers or property, for compensation. HRS § 271-4(11).

¹⁶KMC's Supplemental Brief at 10-11.

However, before the commission can make a determination on that issue or on any other issue in this docket, it must have subject matter jurisdiction. Accordingly, we must first determine whether we have subject matter jurisdiction, even if neither of the Parties files a motion to dismiss for lack of subject matter jurisdiction.¹⁷ See Peterson v. Hawaii Electric Light Company, Inc., 85 Hawai'i 322, 326 944 P.2d 1265, 1269 (1997); and Housing Fin. and Dev. Corp. v. Castle, 79 Hawai'i 64, 76, 898 P.2d 576, 588 (1995).

KMC is a Joint Services Recreational Center, located in Hawaii Volcanoes National Park. It is available for use by all active and retired military, Reserve and National Guard members, current and retired DoD civilian employees, dependents and sponsored guests.¹⁸ KMC is under the control of the Secretary of the Army, subject to the authority, direction and control of the Secretary of Defense. 10 USCS § 3013(b)(9). Where the federal government has not granted a state authority to regulate a federal governmental function, the Supremacy Clause preempts any such regulation. As noted above, there has been no congressional grant of jurisdiction over KMC to the State. Thus, without circumventing the Supremacy Clause, the commission cannot assume jurisdiction over KMC and the instant Complaint.

Neither can the commission assume jurisdiction over a NAFI, such as KMC, as Jack's argues the commission should do. We are not authorized to make a determination on Jack's allegation

¹⁷See n. 14, *supra*.

¹⁸Complaint, Exhibit B.

that KMC is not a NAFI because it provides its transportation services to members of the general public beyond its authorized patronage group. First of all, Jack's assertion that the group from Aina Haina Elementary¹⁹ is not authorized by KMC's rules and regulations is speculative. Even assuming, arguendo, that this assertion is true, the commission is unable to determine that KMC is in violation of its rules and regulations, and therefore not a NAFI as alleged by Jack's, because it would require a consideration and analysis of the relevant DoD directives and Army regulations, which is not within our jurisdiction under HRS Chapter 271.

The same can be said for Jack's assertion that the federal enclave exception does not provide KMC with an exemption from commission jurisdiction. Again assuming, arguendo, that Jack's is correct in its assertion that the State has reserved jurisdiction over violations committed on public highways, outside of the federal enclave, the commission would still have to establish that a breach of either the DoD directives or Army regulations by KMC has occurred, which also is not within commission jurisdiction pursuant to HRS Chapter 271.

Thus, upon considering all of the arguments presented by Complainant and Respondent, we conclude that the commission is not the appropriate forum to address the allegations in the Complaint. We agree with Respondent that to the extent Jack's' Complaint pertains to the allegation that Respondent is in violation of any federal regulation, under the facts and

¹⁹Complaint at 9-11.

circumstances of this case, the appropriate forum for such a dispute is with federal authorities. For these reasons, we conclude that, as a matter of law, the commission is not the appropriate forum to hear Complainant's allegations regarding Respondent's alleged violations, and that the commission does not have subject matter jurisdiction to hear the Complaint, under the facts and circumstances of this case. Accordingly, the commission will, *sua sponte*, dismiss the Complaint, without prejudice.

IV.

Order

THE COMMISSION ORDERS that Jack's Complaint, filed on June 4, 2004, is dismissed without prejudice for lack of subject matter jurisdiction.

DONE at Honolulu, Hawaii JUN 17 2005.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By Wayne H. Kimura
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Benedyne S. Stone
Benedyne S. Stone
Commission Counsel

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21876 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: JUN 17 2005